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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

KEITH BROWN et al., Plaintiffs and Appellants, v. LORRE HENDERSON et al., Defendants and Respondents.	A143384 (Solano County Super. Ct. No. FCS035972)

Defendant Lorre Henderson, M.D., a surgeon, removed a polyp from the sinus of plaintiff Keith Brown. In the process, Dr. Henderson penetrated Mr. Brown's orbital bone and damaged his eye. Keith and his wife, Myeshia Brown, sued Henderson, contending he had been negligent in performing the surgery and had not properly informed Mr. Brown of the risks of the procedure. The jury found for Henderson. Plaintiffs contend the verdict was against the weight of the evidence, the jury was not properly instructed, and their attorney was not permitted to make full use of a medical text. Finding no error, we affirm.

I. BACKGROUND

In June 2010, plaintiffs sued Dr. Henderson and Sutter Regional Medical Foundation for medical malpractice.[1] The prior year, Mr. Brown had consulted Henderson regarding obstruction of his right nasal airway. A CT scan revealed a polyp, located near Mr. Brown's eye, that extended from his right sinus and obstructed the

[1] Sutter Regional Medical Foundation was dismissed on summary judgment. Plaintiffs have not challenged that ruling on appeal.

airway. Henderson reviewed the CT scan with plaintiffs and recommended surgery to remove the polyp. During the surgery, one of Dr. Henderson's surgical tools penetrated Brown's eye socket, injuring his eye.[2]

Dr. Henderson's notes from the consultation state, "The risks and benefits of the surgery were discussed with [Mr. Brown] and he wants to proceed with [the surgery]." Explaining the notation, Dr. Henderson testified he "would have discussed the pain that was associated with this and his post-operative course bleeding that he would have during the surgery, as well as potentially afterwards, the risk of possible injury to his eye, and probably recurrence of the polyp as well." He also said he reviewed with plaintiffs the X-ray, noting the proximity between Mr. Brown's eye and the polyp's location in his sinus. Dr. Henderson acknowledged he "didn't discuss anything specific with Mr. Brown regarding how an injury to his eye could occur." In contrast, Mr. Brown testified Dr. Henderson never mentioned a risk of injury to his eye. Mrs. Brown, who confirmed she was present at the consultation, agreed there was no discussion of this type of injury.

The parties presented conflicting expert testimony on the standard of care with respect to informed consent. Plaintiffs' expert witness, Dr. Hamid Djalilian, testified that when "discussing the risks of a surgery, one has to be pretty specific." In these circumstances, Dr. Djalilian believed, Dr. Henderson should have described the risk in more detail, telling Mr. Brown there was a low risk of permanent damage to his eye, rather than merely mentioning the possibility of an eye injury. Dr. Dale Rice, one of Dr. Henderson's experts, testified that the primary risks from the type of surgery performed on Mr. Brown were injury to the eye and the brain. Dr. Rice opined Dr. Henderson's discussion of risks, as he represented them, was adequate because, "It covered the important issues, I think. And that's what you need to do." A second

[2] Plaintiffs refer to the polyp surgery in their briefs as the "first procedure" because Dr. Henderson later conducted another surgery to attempt to repair the eye damage. Because plaintiffs assert no claims of error involving the later procedure, we do not discuss it here.

Henderson expert, Dr. Richard Goode, concurred, " 'Eye injury' is, I think, specific enough."[3]

With respect to Dr. Henderson's performance of the surgery, the expert testimony was similarly in conflict. Dr. Djalilian testified for plaintiffs that while contact by surgical instruments with the orbital bone was an inherent risk of this type of surgery, actual penetration of the bone was not. Because Dr. Henderson acknowledged his view of the instruments was obscured at the time of the penetration, Dr. Djalilian believed, his conduct of the surgery was negligent. As Dr. Djalilian said, a surgeon must always "see what you're doing." Dr. Henderson's decision to proceed with the surgery despite being unable to see where his tools were was, Dr. Djalilian testified, the "fatal mistake." In addition, Dr. Djalilian found evidence of negligence in the degree of harm inflicted. While a minor break in the orbital bone, causing bleeding, was an inherent risk, he testified, permanent injury to the eye, such as Mr. Brown suffered, was an indicator of negligence.

In contrast, Dr. Rice testified that Dr. Henderson's manner of performing the surgery was within the standard of care. Perforation of the orbital bone, he believed, was an inherent risk of the surgery. A large polyp, like that in Mr. Brown's sinus, Dr. Rice testified, puts pressure on the orbital bone, and "over time, bone will thin and go away." Dr. Rice believed Henderson's penetration of the orbital bone likely occurred from an "instantaneous" contact with the bone, which "can happen with any instrument to anybody." Responding to Dr. Djalilian's claim, Dr. Rice testified that it was "impossible" in this type of surgery for the surgeon to see at all times where the instruments were located. Dr. Goode agreed that while "[i]deally" a surgeon should always be able to see where his or her instruments are cutting, "there's times you can't

[3] Plaintiffs contend Dr. Goode testified that Dr. Henderson's disclosure was inadequate, but the record does not support the contention. Dr. Goode acknowledged that Dr. Henderson did not discuss the specific risks of eye injury with Mr. Brown, but when asked whether the standard of care required such specific disclosure, Dr. Goode responded, "I don't think so, no. [¶] . . . [¶] 'Eye injury' is, I think, specific enough."

see. The tumor is in the way. . . . [¶] . . . [¶] . . . And then you do something to try and minimize the likelihood of complications."

During his cross-examination of Dr. Rice, plaintiffs' attorney was permitted to use a treatise edited by Dr. Rice and to which Dr. Rice personally contributed an article, published five years before the surgery. Based on counsel's reference to the text, Dr. Rice acknowledged that the standard of care of informed consent required a surgeon to make the patient aware "of the proximity of the eyes and brain to the surgical field and the inherent risks of injury to the[se] structures," as well as the prevalence of serious operative complications. The court precluded counsel from quoting from the treatise, although he was permitted to read from the book in formulating questions, and the court did not admit the book into evidence.

On the issue of informed consent, the trial court delivered a version of the standard jury instructions on informed consent, CACI Nos. 532 and 533. As delivered by the court, these instructions stated: "A patient's consent to a medical procedure must be informed. A patient gives informed consent only after the otolaryngologist has adequately explained the proposed treatment or procedure. An otolaryngologist must explain the likelihood of success and the risk of agreeing to a medical procedure in language that the patient can understand.

"An otolaryngologist must give the patient as much information as he needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances.

"The patient must be told about any risks of death or serious injury or significant, potential complications that may occur if the procedure is performed. An otolaryngologist is not required to explain minor risks that are not likely to occur.

"[Plaintiffs] claim that [Dr. Henderson] was negligent because he performed a polyp removal from the nasal sinuses on Keith Brown without first obtaining his informed consent. To establish this claim, [plaintiffs] must prove all of the following:

That [Dr. Henderson] performed a polyp removal from the nasal sinuses on Keith Brown; that Keith Brown did not give his informed consent for a polyp removal from the nasal sinuses. That a reasonable person in Keith Brown's position would not have agreed to the polyp removal from the nasal sinuses if he or she had been fully informed of the results and risk and alternatives to the procedure and that Keith Brown was harmed by a result or risk that [Dr. Henderson] should have explained before the polyp removal from the nasal sinuses was performed."

The jury returned a defense verdict, finding that Dr. Henderson was not negligent and Mr. Brown gave informed consent to the surgery.

II. DISCUSSION

A. *Informed Consent*

Plaintiffs contend that the jury's finding that Dr. Henderson obtained informed consent to the polyp removal was not supported by the evidence.

A physician must make "reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243.) "[W]hen a given procedure inherently involves a known risk of death or serious bodily harm, a medical doctor has a duty to disclose to his patient the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur." (*Id.* at p. 244.) "[T]he patient's right of self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever information is material to the decision. Thus the test for determining whether a potential peril must be divulged is its materiality to the patient's decision." (*Id.* at p. 245.) In short, a physician has a legal duty to disclose to the patient all material information. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1186 (*Arato*).) The doctor is also required to reveal any additional information that a skilled practitioner in good standing would provide under similar circumstances. (*Cobbs*, at pp. 244–245.)

We review a jury's determination with respect to informed consent for substantial evidence. (*Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 113.) " 'When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence, but rather determine whether, after resolving all conflicts favorably to the prevailing party, and according the prevailing party the benefit of all reasonable inferences, there is substantial evidence to support the judgment.' [Citation.] In reviewing the evidence on appeal, all conflicts must be resolved in favor of the judgment, and all legitimate and reasonable inferences indulged in to uphold the judgment if possible. . . . When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Id.* at pp. 113–114.)

The testimony of Dr. Henderson and his experts, Drs. Rice and Goode, provides substantial evidence to support the jury's finding of informed consent. As they explained, one of the inherent risks of this type of surgery is injury to the eye. Dr. Henderson said he told Mr. Brown about this risk and pointed out the nearness of the polyp to his eye, although Dr. Henderson acknowledged he did not go into detail about the nature of the risk. According to Drs. Rice and Goode, Dr. Henderson's disclosure was sufficient to satisfy prevailing standards of practice.

Plaintiffs argue we should apply a de novo standard of review, rather than the more deferential sufficiency of the evidence standard. As noted above, the applicable case law applies a substantial evidence standard, and plaintiffs cite no legal authority to support their argument for a stricter standard. In informed consent cases, the Supreme Court has held that the role of the trier of fact is "paramount," since these cases involve "a peculiarly fact-bound assessment which juries are especially well-suited to make." (*Arato, supra,* 5 Cal.4th at pp. 1184, 1186.) Application of a de novo standard of review would be wholly inconsistent with the Supreme Court's recognition of the importance of the trier of fact, since it would effectively substitute the views of this court for those of the jury.

Plaintiffs argue the evidence is not in dispute as to the nature of the risk advisement, reducing the issue to a matter of law appropriate for de novo review. The

premise for the argument, however, is incorrect. The evidence was in dispute, since plaintiffs claimed they were given no information about the risk of eye injury, while Dr. Henderson testified to the contrary. Further, even if the nature of the information provided was not in dispute, the legal issue was whether Dr. Henderson provided Mr. Brown with all "material" information. Like a finding of negligence, this is the type of mixed question of law and fact that is appropriate for a jury and ordinarily cannot be resolved as a matter of law.

Plaintiffs also argue Henderson's risk advisement was inadequate because he did not inform them of the specific event that occurred here—invasion of the orbital socket during surgery. That risk, however, is included within Dr. Henderson's disclosure of a risk of injury to Mr. Brown's eye. The relevant case law does not require that a patient be advised of the manner in which the inherent risks will be realized, such as by invasion of the orbital socket, as opposed to some other mechanism of injury, unless that mechanism is material to the decision. The legal issue was therefore whether it was material to Mr. Brown's decision to proceed with the surgery to be informed specifically that his orbital socket could be invaded, once he had been given the more general caution there was a risk that his eye could be injured in the course of the surgery. As noted above, Drs. Goode and Rice testified that the level of detail in Dr. Henderson's disclosure was sufficient, and the jury found Mr. Brown had been given informed consent, implicitly finding further detail was not material.[4] We have no basis for reversing that finding on the basis of the evidence presented.

B. ***Informed Consent Instruction***

Plaintiffs also challenge the court's jury instruction on informed consent as legally inadequate. As noted, the court's instruction followed the standard California jury

[4] In arguing for a lack of informed consent, plaintiffs falsely claim that Dr. Goode testified Dr. Henderson's disclosure of risks was inadequate and Dr. Rice testified a surgeon must disclose specifically the risk that the orbit would be invaded. In fact, Dr. Goode stated that "eye injury" is sufficient. The testimony of Dr. Rice cited by plaintiffs contains no opinion that specific disclosure of orbital invasion was required.

instructions on informed consent. Plaintiffs contend the standard instruction erroneously omits two aspects of informed consent law: the requirement that a physician advise regarding alternative treatments and the risks associated with foregoing the treatment.

We find no merit in the contention. There is no absolute requirement that a physician advise a patient about alternative treatments and the risk of doing nothing. Rather, when those elements of informed consent are pertinent—that is, when doing nothing is a realistic alternative and when there are reasonable alternatives to the proposed procedure—the duty to advise with respect to these issues is included within the general requirement that a physician provide all material information. (*Schiff v. Prados* (2001) 92 Cal.App.4th 692, 701.) When there are no reasonable alternatives, there is similarly no duty to advise with respect to them. (*Ibid.*)

As the trial court instructed, a physician "must give the patient as much information as he needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure and any other information skilled practitioners would disclose to the patient under the same or similar circumstances." The requirement to provide "as much information as [the patient] needs to make an informed decision" naturally includes possible alternative treatments and the risk associated with doing nothing when, under the specific circumstances prevailing in a given situation, these are relevant to a patient's decision whether to undergo the proposed treatment. When there are no reasonable alternatives or when doing nothing is simply not realistic, the physician has no obligation to advise regarding these matters. In short, the duties to inform of reasonable alternatives and the risk associated with inaction are merely particular examples of the general obligation to provide all material information to a patient. The trial court was therefore not required to single them out for express mention.[5] Plaintiffs cite no case law to the contrary.

[5] Here, the parties provided evidence and argument with respect to these issues. The jury was therefore well aware of the possibility of advising Mr. Brown regarding

C. *Inherent Risk*

Plaintiffs argue Dr. Henderson should not have been permitted to argue inherent risk "as a defense" to their claim. In making this argument, plaintiffs contend Dr. Henderson should not have been permitted to argue penetration of Mr. Brown's orbital bone was an "inherent risk" of this type of surgery—in other words, that penetration was something that could have happened in the absence of negligence.[6] Plaintiffs claim the evidence at trial "showed, without dispute," that Dr. Henderson was negligent because he did not know the location of his surgical instruments within the sinus cavity at the time the penetration occurred.

Contrary to plaintiffs' claim that the undisputed evidence demonstrated Dr. Henderson was negligent, both Dr. Rice and Dr. Goode testified that his conduct of the surgery was within the standard of care. Dr. Rice testified unequivocally that penetration of the orbital bone was an inherent risk of this type of surgery because the presence of a polyp sometimes weakens the bone. For this reason, Dr. Henderson's tools could have penetrated the bone merely by incidental contact. With respect to plaintiffs' specific argument, neither testified a surgeon is necessarily negligent if he or she proceeds with surgery at a time when the exact location of the surgical tools cannot be seen.[7] Both agreed there can be times during surgery when the surgeon's view of the instruments becomes obscured and the standard of care does not require a surgeon to

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alternatives and the possibility of doing nothing when it found Dr. Henderson's disclosure adequate.

[6] The defense of inherent risk, to the extent it exists, is actually one aspect of the assumption of risk doctrine (*Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1059), not negligence. The defense was not invoked here. As explained in the text, plaintiffs' argument is actually that there was no sufficient evidence to support a finding that invasion of the eye socket was an inherent risk of this surgery.

[7] Plaintiffs contend that Dr. Henderson acknowledged he was disoriented with respect to the location of his surgical tools, but the testimony does not support the claim. In testifying about his insertion of the surgical tool into Mr. Brown's sinus, Dr. Henderson said he had a clear view, using a small endoscope, of the sinus prior to inserting the tool and knew where he intended to insert it.

cease any further activity in these circumstances. Accordingly, there is no merit to plaintiffs' claim that there was no evidence to support Henderson's argument that penetration of the orbital bone was an inherent risk of this type of surgery.

D. *Use of Treatise in Cross-examination*

Plaintiffs contend the trial court erred in refusing to permit their counsel to read portions of the treatise edited by Dr. Rice aloud, publish portions of the treatise to the jury, or use portions of the book Dr. Rice did not write in cross-examination.

The authority relied upon by plaintiffs is Evidence Code section 721, subdivision (b) (hereafter section 721(b)), which governs the use of treatises in the cross-examination of an expert witness. Section 721(b) states such a volume may not be used in cross-examination unless (1) the witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion; (2) the publication has been admitted in evidence; or (3) the publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. The subdivision further provides, "If admitted [into evidence], relevant portions of the publication may be read into evidence but may not be received as exhibits."

"[T]o counterbalance the broad scope of cross-examination of expert witnesses [permitted by Evidence Code section 721, subdivision (a)], the purpose of section 721(b) is 'to prevent an adverse party from getting before the trier of fact the *inadmissible hearsay* views of an *absent* expert, which may be *contrary* to the expert witness' opinion, through the device of cross-examining the expert witness regarding the absent expert's publication or report even though the testifying expert had *not* used or considered that publication or report in *any* way in arriving at or forming his opinion testimony.' " (*McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677, 683, fn. omitted (*McGarity*).) We review the trial court's ruling on the scope of cross-examination for abuse of discretion.[8] (*People v. DeHoyos* (2013) 57 Cal.4th 79, 123.)

[8] Plaintiffs contend we should apply a de novo standard of review because application of Evidence Code section 721 involves the interpretation of a statute. Because none of the issues raised by plaintiffs are directly resolved by the language of

As an initial matter, it is not clear the preconditions to cross-examination under section 721(b) were satisfied here. Dr. Rice did not claim to have considered the book in forming his opinions and denied it was authoritative given its age, and the treatise was not admitted into evidence. When Dr. Henderson was asked whether the treatise was "reliable and authoritative," he responded, "At the time it was written, that's probably a fair statement," echoing Dr. Rice's concern that the treatise was dated. Because the trial court permitted counsel to cross-examine Dr. Rice on the basis of the treatise, however, we need not resolve this issue.

Assuming section 721(b) was satisfied, it was not violated here. Plaintiffs' attorney was permitted to use the treatise in the cross-examination of Dr. Rice, which is all that Evidence Code section 721 requires. Section 721(b) does not guarantee counsel the ability to read portions of the treatise or publish portions of the treatise to the jury. The manner of cross-examination is left to the discretion of the court, and we find no abuse of that discretion.

Further, we find no prejudice here resulting from the trial court's restrictions on cross-examination. While Mr. Brown argues his attorney was not permitted to read directly from the treatise, counsel accomplished essentially the same end by using direct quotations from the text in phrasing some of his questions. Plaintiffs' opening brief contains a list of points that counsel sought to make by use of the treatise, and the trial court permitted him to rely on the treatise to make most of these points. Plaintiffs contend they were prejudiced by the inability to publish portions of the treatise to the jury, but this is just what section 721(b) was designed to prevent: the hearsay use of a treatise as evidence. (*McGarity, supra,* 8 Cal.App.4th at p. 683.)

E. *Res Ipsa Loquitur Instruction*

Plaintiffs contend the trial court should have instructed the jury on the doctrine of res ipsa loquitur.

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section 721, no statutory interpretation is necessary. This is an issue of judicial discretion in the application of the statute.

Initially, plaintiffs are precluded from raising the absence of a res ipsa loquitur instruction as error because their counsel told the court, ". . . I wouldn't want the instruction," in connection with the polyp surgery. The issue was therefore waived. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653 [party cannot raise instructional error to which it consented].)

Even if the issue had not been waived, we would find the instruction inappropriate here. The res ipsa loquitur doctrine " 'is a rule of evidence allowing an inference of negligence from proven facts. [Citations.] It is based on a theory of "probability" where there is no direct evidence of defendant's conduct, [citations], permitting a common sense inference of negligence from the happening of the accident. [Citations.] . . . The applicability of the doctrine depends on whether it can be said the accident was probably the result of negligence by someone and defendant was probably the person who was responsible. [Citations.] In the absence of such probabilities, there is no basis for an inference of negligence serving to take the place of evidence of some specific negligent act or omission.' " (*Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1540.) The doctrine is applicable only to "certain kinds of accidents that are so likely to have been caused by a defendant's negligence that, in the Latin equivalent, ' "the thing speaks for itself." ' " (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1389.)

The requirements for res ipsa loquitur were not present. First, this is not a case in which there was no direct evidence of the purportedly negligent conduct. While Dr. Henderson was not certain *why* his instruments penetrated Mr. Brown's orbital bone, there was no uncertainty about what happened. (See *Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 195 [res ipsa loquitur inappropriate where facts undisputed regarding how an accident occurred].) Second, whether this was the type of accident that would not have occurred in the absence of negligence was a topic of sharp dispute among the expert witnesses. Dr. Henderson's experts testified the accident was an inherent risk of this type of surgery—that is, it could and did occur without any negligence on the part of the surgeon. Plaintiffs' expert, Dr. Djalilian, agreed cracking of the orbital bone could occur without negligence, but he believed the degree of invasion in this case indicated

negligence. Given the dispute on this issue among the medical care professionals, it cannot be said that Dr. Henderson's invasion of the orbital bone "speaks for itself" as an act of negligence. It would have been entirely inappropriate for the trial court to, in effect, take the issue of negligence from the jury by instructing that negligence was probable in these circumstances, as required for application of res ipsa loquitur.

III. DISPOSITION

The judgment of the trial court is affirmed. Dr. Henderson may recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.

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